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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

MICHAEL WYCLIFFE et al., Plaintiffs and Appellants, v. BIG 4 RENTS, INC. et al., Defendants and Respondents.	A100201 (Sonoma County Super. Ct. No. 223708)

I. INTRODUCTION

In this product liability action, Michael and Joy Wycliffe sued the Ridge Tool Company and Big 4 Rents, Inc. for injuries received by Michael Wycliffe when he cut his hand while operating a metal tool manufactured by Ridge Tool and rented from Big 4 Rents. Following plaintiffs' opening statement, the trial court granted defendants' motion for nonsuit and entered judgment for defendants. On appeal, plaintiffs contend the trial court improperly concluded they could not establish several essential elements of a products liability claim. Wycliffe argues his anticipated evidence was sufficient to show the die head that injured him was defective and this defect existed when the product left Ridge Tool's possession. We affirm the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

In his opening statement and in offers of proof made after the nonsuit motion, plaintiffs stated the evidence would show the following: Wycliffe, a 58-year-old construction worker, was injured while working with a machine called a power threader. A power threader contains a motor drive and a die head. A pipe is placed into the motor

drive. As the drive spins the pipe, the die head is slid into place on the pipe. While the pipe rotates, the teeth of the die head grind into the pipe. This operation is referred to as "threading" a pipe. After the pipe is threaded, the operator pulls the die head back up and takes the pipe out of the machine. The first time he used the die head on which he was injured, Wycliffe threaded a pipe and, as he pulled the die head back up with his left hand, he nicked his finger.[1]

After the injury, Wycliffe observed a "sharp edge" on the handle of the die head. The die head was returned to Big 4 Rents. No one disputed that the die head used by Wycliffe was a Ridge product. Big 4 Rents' inventory indicated that the die head rented to Wycliffe was a model No. 811-A. Four months before the injury, Big 4 Rents purchased two No. 811-A die heads. Big 4 Rents does not have a tracking system, however, and was unable to confirm that one of the 811-A's they had purchased before the injury was actually delivered to the store from which Wycliffe rented the die head. Wycliffe testified at his deposition that the die head on which he was injured was differently configured than the 811-A. He was unable to identify the model of the die head.

Wycliffe's co-worker, Tim Brown, used his hammer to blunt the edge. Brown, who had worked in a foundry, described the defect as a "flash," a "bur" and a "sharp edge." Brown identified the die head as a model 811-A manufactured by Ridge.

Both Wycliffe and Brown testified at their depositions that the die head looked new. Brown stated it was in "pretty good shape."

Ridge Tool Company makes 35,000 to 40,000 die heads a year. After the die heads are cast, they are brought to a factory where Ridge assembles all the parts of the machine. The die head is machined and when this occurs, sharp edges or "burrs" are created. Ridge sands or polishes these edges off. In their opening statement, plaintiffs

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[1] The "nick" had serious consequences. Wycliffe developed a severe staph infection, had surgery on the injured hand, and was hospitalized for four days. Wycliffe's recovery was difficult. He missed two years of work while he underwent physical therapy and, ultimately, had a second surgery on his hand.

summarized the testimony of two witnesses from Ridge Tools, Revelinski and Morin: "[D]uring the manufacturing process they pour the steel into the molds; flash is developed. They will also testify that then it goes to wheel abrasion and polishing . . . . [¶] [i]t comes then into their . . . manufacturing place; and they machine the tool, and when they machine it they're cutting in different parts, and then a bunch of sharp edges develop; and then again it goes through a polishing phase. [¶] After that, that's when they put it to the test, and it's about a 60-second test, and the guy is standing there with a . . . file, to get any surface defects. . . . [¶] . . . [¶] And they also . . . will confirm that their own documentation in the manufacturing is replete with statements -- you know, break all sharp edges, make sure there are no burstings, to that effect." The sharp edges or flashings are generally located "at the seams around the outside at the castings, which is consistent with where the two witnesses described the style of the sharp edge that cut Mr. Wycliffe."

Defendants' experts agreed that sharp features ordinarily would not develop on the die head over time. In his deposition, Morin, a metallurgy engineer, agreed that the die head "should be safe from developing sharp features" and Meyer, another Ridge Tool expert agreed that "sharp edges, barbs, burrs, things of that nature, could not develop in normal wear and tear" on the die heads. Revelinski would testify that "[t]his machine is designed to be used in work situations, and it's designed to blunt, not get sharper."

After Wycliffe's opening statement, defendants moved for nonsuit. The trial court granted the motion. This timely appeal followed.

III. DISCUSSION

The sole contention raised by plaintiffs is the propriety of granting a nonsuit. "The standard of review for a nonsuit after conclusion of the opening statement is well settled. Both the trial court in its initial decision and the appellate court on review of that decision must accept all facts asserted in the opening statement as true and must indulge every legitimate inference which may be drawn from those facts." (*Abeyta v. Superior Court* (1993) 17 Cal.App.4th 1037, 1041.) An order granting nonsuit "can only be upheld on appeal if, after accepting all the asserted facts as true and indulging every

legitimate inference in favor of plaintiff, it can be said those facts and inferences lead inexorably to the conclusion plaintiff cannot establish an essential element of its cause of action . . . ." (*Ibid.*) Only when a " '. . . plaintiff produces no substantial evidence of liability or proximate cause [is] the granting of a nonsuit . . . proper. [Citation.]' [Citation.]" (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1209.)

The issue in this case is whether the anticipated evidence described in the opening statement and plaintiffs' offers of proof is substantial evidence of a manufacturing defect. A manufacturing defect claim "focuses on whether the particular product involved in the accident was manufactured in conformity with the manufacturer's design." (*Dierks v. Mitsubishi Motors Corp.* (1989) 208 Cal.App.3d 352, 355.) The essential elements of a manufacturing defect claim are: "1. The defendant was the [manufacturer or supplier] of a product . . . ; [¶] 2. The product possessed a defect in its manufacture; [¶] 3. The defect in manufacture existed when the product left the defendant's possession; [¶] 4. The defect in manufacture was a cause of injury to the plaintiff; and [¶] 5. Plaintiff's injury resulted from a use of the product that was reasonably foreseeable to the defendant[s]." (BAJI No. 9.00.3; see *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 429.)

This case involves two of the elements of a manufacturing defect claim: Whether the die head possessed a defect and whether the defect existed when the die head left Ridge Tools' possession. We have reviewed the record and conclude that plaintiffs have not met their burden as to the latter requirement. In light of this conclusion, we need not reach the question of whether plaintiffs' anticipated evidence is sufficient to establish that the product was defective.

Plaintiffs must show the defect existed when the die head left the manufacturer. A plaintiff may meet this requirement through circumstantial evidence. (*Elmore v. American Motors Corp.* (1969) 70 Cal.2d 578, 583–584 (*Elmore)*.) Defendants contend that, because plaintiffs cannot show what happened to the die head after it left the factory, they have failed to establish this essential element of a manufacturing defect claim. We agree.

In making this argument, defendants analogize to cases involving res ipsa loquitur, although they acknowledge that a manufacturing defect cannot be shown by reliance on the doctrine of res ipsa loquitur. (*McCurter v. Norton Co.* (1968) 263 Cal.App.2d 402, 408.) It is unnecessary to look to this area of the law because several courts have already considered the question of how much must be shown to establish that a product was defective when it left the manufacturer. *Elmore, supra,* 70 Cal.2d 578 and *Moerer v. Ford Motor Co.* (1976) 57 Cal.App.3d 114 (*Moerer*), are particularly relevant, although neither is discussed in any detail by the parties.

In *Elmore,* the allegedly defective product was a drive shaft that fell from a car. (*Elmore, supra,* 70 Cal.2d at p. 584.) An expert testified that "the cause of a drive shaft falling would be either loose fastenings or metal failure and would not be 'anything the driver did' or normal wear and tear." (*Ibid.*) In addition, the car had been driven less than 2,800 miles and no servicing had been done on the drive shaft or anything connected to it. (*Ibid.*) The *Elmore* court concluded that, "In these circumstances, it is not unreasonable to conclude that the defect in the metal or in the fastenings existed at the time of sale." (*Ibid*.)

In *Moerer*, a tie rod broke shortly before an accident. The plaintiff argued she could show the car was defective when it left the manufacturer simply by establishing that the tie rod broke. (*Moerer, supra,* 57 Cal.App.3d at p. 116.) The court rejected this argument. The court pointed out that the plaintiff had failed to produce any evidence of the use to which the car was put during the almost three years it was in the plaintiff's possession. (*Ibid.*) The court stated it would not "infer from a silent record that there was a collision or other unusual impact which weakened the rod before this accident." (*Id.* at p. 117.) However, because it would be a simple matter for the plaintiff to negate the possibility of a "collision or other unusual impact over the long period of plaintiff's control," nonsuit was proper. (*Ibid*.)

In *Elmore,* evidence that a defect would not occur through normal wear and tear, and evidence that a product had not been used a great deal were sufficient to show that a product was defective when it left the manufacturer. In *Moerer*, the court concluded that

the plaintiff could easily have satisfied this element by showing that, in the long period of time the plaintiff had owned the car, he had not experienced any unusual impact. The *Moerer* court observed that a silent record on this issue, however, would not be construed as evidence of such an unusual event. Both cases suggest that a plaintiff must account for the product after it leaves the manufacturer in order to show that the defect was present when the product left the manufacturer. We turn now to the evidence.

Wycliffe and Brown believed the die head "looked new" or was in "pretty good shape." These conclusory observations are not substantial evidence that the die head was defective when it left the manufacturer. Additional evidence of the die head's condition when it left the manufacturer comes from three experts familiar with defendants' manufacturing process. According to Wycliffe, these experts would testify that sharp edges develop during the manufacturing process, Ridge sands or polishes the edges off, and these sharp features ordinarily do not develop on the die head over time or through ordinary wear and tear. At most, however, these witnesses' testimony would have established that it was merely possible that at some time a Ridge Tool die head left Ridge's possession with an imperfect surface and not a probability that the alleged defect on the die head used by Wycliffe had resulted from the manufacturing process. Thus, this evidence does not rule out the possibility that the defect on the die head was created by something other than the manufacturing process during the time after the die head left Ridge and was rented by Wycliffe. Big 4 Rents purchased two new die heads from Ridge four months before Wycliffe was injured. There is no evidence that, during these intervening four months, the die head was free from any incident in which a sharp edge might develop.

Wycliffe asks us to infer from the fact that sharp edges would not develop in the die head from ordinary wear and tear and sharp edges can be created during the manufacturing and machining process that the die head left the manufacturer with this defect. This we cannot do. "[W]hile the court may infer facts from the evidence, those inferences must be logical and reasonable. The decision about what inferences can permissibly be drawn by the fact finder are questions of law for determination by the

court, inasmuch as an inference may not be illogically and unreasonably drawn, nor can an inference be based on mere possibility or flow from suspicion, imagination, speculation, supposition, surmise, conjecture or guesswork. [Citations.]" (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1580–1581.) In the absence of any evidence about what might have happened to the die head after it left the manufacturer, we cannot draw a reasonable inference that the product was defective when it left the manufacturer. Plaintiffs' anticipated evidence is not, therefore, substantial evidence that the die head was defective when it left the manufacturer. Nonsuit was proper.

IV. DISPOSITION

The judgment is affirmed.

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Margulies, J.

We concur:

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Marchiano, P.J.

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Swager, J.